In footnote 42 of the Notice, the Commission proposes to use the test established (for copyright purposes) in WGN Continental Broadcasting v. United Video, 628 F.2d 622, 626 (7th Cir. 1982) as a model for setting the scope of the program-related material subject to must-carry requirements. In WGN, the court found that material included in the VBI of a newscast was within the scope of the news program for cable compulsory license purposes if three factors were met. The VBI material must be "intended to be seen by the same viewers as are watching the [program], during the same interval of time in which that [program] is broadcast, and as an integral part of the ... program." WGN at 626. The court ruled that the VBI material in question, which included both news related to the news in the program and information about the station's program schedule, met the program-related test.

We believe that in implementing Section 614(b)(3) the Commission should adopt a broad definition of "program-related" that would require carriage of VBI material if the three WGN factors cited above are present. "Integral part of the program" should be defined broadly enough to include information that is unlocked if the viewer is equipped with a special decoder and/or peripheral equipment for displaying or manifesting such information. Examples would include baseball statistics intended to be overlaid on the screen during a baseball game or program-related coupons, order forms or recipes that are printed out on separate viewer-purchased

equipment. This should hold true whether or not the viewer pays a supplemental fee.

Second, the Commission should clarify that VBI material related to the commercials in the broadcast program is "program-related." Including commercial material within the scope of "program-related" is consistent both with the WGN analysis and with the legislative history of Section 614. In both the House and Senate reports, the relevant Committees address the term "program-related material" in the context of the "main program service." See S. Rep. No. 92, 102nd Cong., 1st Sess. 85 (1991) ("Senate Report") and House Report at 93. Commercials are an integral part of a broadcaster's "main program service." Since broadcasting revenues derive virtually exclusively from advertising revenues, programs would not be possible without the commercials that are integrated into them. Coupons, order forms and other data related to the commercial that can be activated on special viewer equipment should likewise be considered program-related.

## IV. Channel Positioning.

In paragraph 33 of the Notice, the Commission requests comment on how it should resolve disputes regarding channel positioning, in particular, whether it should establish a formal priority structure to govern cases where more than one station makes a valid claim to the same cable

channel. We believe that the governing principle that should inform this issue is that priority be given to the solution that is least confusing and disruptive to the public. With the exception noted below, priority to over-the-air channel position best advances this principle. Broadcast stations in general expend significant amounts of air time as well as advertising dollars promoting their over-the-air channel position. In making hourly station identification announcements, stations use their channel position number in addition to the required call letters. A cable system channel that differs from the over-the-air channel would disrupt audience expectations and create confusion. Broadcasters would be forced to incur added expense (for example, through separate advertising campaigns within separate segments of their markets) to minimize the confusion. On the other hand, there is no added burden on cable operators if, as a result of a rule of over-the-air priority for broadcast stations, cable services occupy different channel positions on different systems since each cable operator only markets to its own franchise area.

The exception to over-the-air channel priority should be the all-UHF market where giving priority to the cable channel position as of January 1, 1992 best advances the principle of least disruption to the public. In case of cable systems in all-UHF markets, broadcast stations typically appear on different cable channels from their over-the-air

channels, most of them grouped together at the low end of cable channel positions.[25] In those markets, broadcasters have consistently promoted and advertised their cable channels, creating a different set of audience expectations which should not be disrupted.

## PART 2 -- RETRANSMISSION CONSENT

### I. "Multichannel Video Programming Distributor" Should Be Expansively Defined.

The statutory definition of "multichannel video programming distributor" is:

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.] 47 U.S.C. §522(12) (emphasis supplied).

Nothing in the statute or the legislative history suggests any rationale or authority for restricting the scope of this definition.[26]

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[25] ABC Research Department review of cable channel carriage in all-UHF markets using NHI and C.O.D.E. data as of December 5, 1992.

[26] When there is more than one entity in the chain of distribution, the FCC suggestion in paragraph 42 of the Notice to apply the multichannel distributor definition to the entity "directly selling programming and interacting with the public" appears to be consistent with the plain reading of the statute, which requires the multichannel distributor to "make [] available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. §522(12).

Where the Congress intended to limit retransmission consent, it did so explicitly in the statute in the exceptions for non-commercial stations and certain superstations and home satellite signals. Size, market, or distribution levels of the multichannel distributor are irrelevant with regard to these exceptions. They were also irrelevant under the retransmission consent requirement that applied to broadcast stations under the pre-existing §325(b). There is no reason to consider them relevant to the FCC's definition of multichannel distributor. Had Congress intended to limit the application of its requirements to some multichannel distributors, but not others, it would have enacted a specific, limiting definition of multichannel distributor. It has not done so.

There are compelling public policy reasons for a broad definition. Parity in treatment among competing multichannel distributors furthers the goal of fostering a competitive marketplace. Communications policy should avoid, whenever possible, giving some competitors special privileges such as, in this case, exemption from retransmission consent requirements.

Legislative history supports the broad definition. Retransmission consent is said to apply to "<u>any</u> cable system or other multichannel video programming distributor." Senate Report at 37 (emphasis supplied). The Congress recognized that broadcasters were being unfairly required to subsidize

cable operators and other multichannel distributors by providing free signals to multichannel distributors who then charge consumers for those same signals:

> While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.

Senate Report at 35. A narrow definition of multichannel video distribution would continue to force broadcasters to subsidize some multichannel distributors.

Finally, the scope of the copyright compulsory license is not relevant to the definition of multichannel distributor; copyright laws protect the program copyright owner and retransmission consent protects the broadcasters interest in their signals. As the Notice in paragraph 64 recognizes, the statute and legislative history are clear that the two statutes deal with two separate bundles of rights. Retransmission consent was carefully crafted so as not to interfere with the cable compulsory license. It would be unfortunate and contradictory for the FCC to limit the scope of a broadcast station's retransmission consent rights by narrowing the definition of multichannel distributor to conform to that very compulsory license the Congress carefully distinguished and avoided. Moreover, the broad definition would anticipate the entry of new multichannel distributors in the marketplace. The purpose of retransmission consent -

- to give the broadcaster control over its signal -- is best served by a definition that does not pick and choose among multichannel distributor competitors at the broadcasters' expense.

## II. Commission Enforcement of Retransmission Consent Contracts.

We agree with the Commission's proposal, at paragraph 57 of the Notice, that retransmission consent authorization be in writing. The Commission also expresses its tentative conclusion that disputes between cable operators and television stations on this subject be settled in a court of competent jurisdiction. Although we agree that the Commission should not "regulate every detail of the terms and conditions of the authority granted"[27] or otherwise adjudicate contractual disputes, we do believe that certain issues fall squarely within the Commission's expertise and should be decided in that forum.

For example, the Commission should make itself available to handle complaints from a broadcast station that a cable system has retransmitted its signal wholly without consent (signal piracy). Assuming the consent must be in a signed writing, making an initial determination whether basic retransmission consent was given should be a fairly simple matter. The Commission could craft regulations limiting the

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[27] Notice at paragraph 57.

extent of its inquiry in this fashion. This would provide broadcasters a remedy for signal piracy short of expensive litigation while providing that disputes over the scope, details and conditions of that consent are to be presented to and resolved in a court of competent jurisdiction.

Similarly, we believe the Commission should enact regulations with respect to the exception to retransmission consent found in §325(b)(2)(C), as the statute itself explicitly directs.[28] Subsection (C) provides that the retransmission consent requirements shall not apply to "retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household." This section was included because of the Satellite Home Viewer Act of 1988,[29] which establishes a statutory license allowing satellite carriers to transmit network broadcast signals to home satellite dishes (HSDs) in unserved households for private home viewing. "Unserved household" (with respect to a particular network) means a household that --

> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined

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[28] Section 325(b)(3)(A) directs the Commission to establish regulations "to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection ... and such other regulations as are necessary to administer the limitations contained in paragraph (2)."

[29] 17 U.S.C. §119 ("SHVA").

> by the Federal Communications Commission) of a primary network station affiliate with that network, and
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> (B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network subscribed to a cable system that provides the signal of a primary network station affiliated with that network.[30]

The "unserved household" restriction in the SHVA was intended to protect the local network affiliate's service area (and hence its revenue base) by restricting delivery of a duplicating network signal to those households beyond the reach of the local affiliate's over-the-air signal.

We believe that the Commission should make itself available to enforce this restriction on retransmission consent. The primary standard to be applied to determine an "unserved household," a signal of Grade B intensity (as defined by the Commission), is an objective standard which clearly falls within the Commission's area of expertise. (The other two relevant inquiries, whether the signal is being used for private home viewing and the timing of any subscription to cable service, are also factual questions with simple answers.)

*Enforcement by the Commission would provide stations* a realistic remedy in cases where litigation is unrealistic because of its expense. Since "unserved household" is

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[30] 17 U.S.C. §119(d)(10).

determined on a home-by-home basis, a station may develop evidence of numbers of homes being provided a signal in violation of the restriction yet not enough homes to warrant the expense of litigation. The ability to bring this evidence before the Commission for resolution would offer an important benefit to stations and ensure that satellite carriers operate in conformity with the law.

Given the direct and immediate threat to a local affiliate's revenue base through a satellite carrier's violation of §325(b)(2)(C) of the 1992 Cable Act, we believe disputes concerning "unserved households" should be resolved in the most efficient manner possible. Because local affiliates are the direct beneficiaries of the protection afforded through the "unserved household" restriction, we believe that the regulations established to implement this provision should permit the affected affiliate to file a complaint as well as the network station whose signal is being retransmitted without authorization.

## III. 47 C.F.R. §76.62 Should Be Clarified.

The Notice, at paragraph 59, seeks comment on whether §76.62 of the Commission's rules should be amended in light of the 1992 Cable Act, particularly with respect to signals carried pursuant to retransmission consent

agreements.[31] Although we believe that no major amendment is necessary, we recommend that the rule be clarified to provide explicitly that the obligation to carry programs "in full" means that all commercials in or adjacent to the program must be carried as well.

References to the rule in Commission opinions make clear that it is interpreted consistently in this fashion, often with specific reference to the Copyright Act sections requiring that in-program and adjacent advertising be carried by cable operators taking advantage of the cable compulsory copyright license.[32] Thus, for example, in its Order eliminating an earlier version of must-carry rules, the Commission justified retention of this portion of §76.62 by stating that it did not impose a mandatory carriage obligation and that it served a separate regulatory goal (citing 17 U.S.C. §111(d)).[33] Clarification of the rule in the manner we

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[31] That section provides in relevant part that "[w]here a television broadcast signal is carried by a cable system, ... programs broadcast shall be carried in full, without deletion or alteration of any portion thereof." 47 C.F.R. §76.62.

[32] 17 U.S.C. §111(c)(3) provides that a cable system's retransmission of a broadcast station's signal is actionable as a copyright infringement "if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions..." (emphasis supplied).

[33] Order In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals By Cable Television Stations 66 Rad. Reg. 2d (P&F) 790 (1989). Commissioner Quello echoed this interpretation in his

suggest would merely codify this interpretation -- it would also eliminate potential ambiguity surrounding the meaning of "programs" in the context of cable carriage.

## IV. Relationship Between Retransmission Consent and Section 614 -- Broadcast Stations and Cable Operators May Negotiate Carriage of Less Than the Station's Complete Program Schedule Under Retransmission Consent.

At paragraph 56 of the Notice, The Commission expresses its tentative conclusion that the provisions of §614, including the requirement that a cable operator carry a station's entire program schedule, apply only to stations exercising must-carry rights. We agree. Stations electing to provide their signals to cable systems pursuant to retransmission consent should not be restricted as to the terms of carriage they are permitted to negotiate including which part of their signal, or which programs, are to be carried.[34] This interpretation is fully supported by the language of the Act. As the Commission notes, §325(b)(4) states that if a television station elects to grant retransmission consent, "the provisions of Section 614

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Dissenting Statement: "This new provision [47 C.F.R. §76.62] requires that broadcast programs be carried in full ... [T]he only concern to the cable operator is that it must carry the program -- including adjacent advertising -- in its entirety or risk losing the benefit of the compulsory license. See 17 U.S.C. §111(c)(3)." Id. at 792-93.

[34] Subject to §76.62 of the Commission's rules, which provides that programs transmitted by cable systems are to be transmitted "in full."

[governing must-carry requirements, including the obligation to carry the complete program schedule] shall not apply to the carriage of the signal of such station by such cable system." We believe that this language is clear.

Moreover, this interpretation is consistent with the basic principle that the parties should have flexibility to negotiate the arrangement that best meets their needs in light of competitive necessities. See, e.g., the Senate Report at pp. 35-36:

> ...many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.

The effect of a contrary interpretation would be to severely constrain the outcome of those marketplace negotiations. Some broadcasters may decide to negotiate for full program schedule carriage to maximize their circulation and advertising revenue. Others may determine that full schedule carriage is less important than the compensation value of particular programs. Depending upon individual market conditions, the most valuable broadcast program a station has to offer a cable system might be a popular

entertainment program otherwise unavailable in the local market or it might be a highly-rated or prestigious local news or public affairs program. Likewise, some cable operators may be interested only in full schedule carriage because of its simplicity of implementation and lack of expense while others may be willing to pay broadcasters more compensation for partial carriage in return for retaining greater flexibility in use of the channel.

Accordingly, we agree with the Commission's tentative conclusion that the provisions of §614 of the Act do not apply to station signals carried by cable systems pursuant to retransmission consent. The station and the cable system should have the flexibility to negotiate for retransmission of all, or part, of the signal, as they see fit.

## V. Program Exhibition Rights and Retransmission Consent.

The Commission asks for comment concerning the relationship between retransmission consent and program exhibition rights -- specifically, whether retransmission consent rights can be superseded by contracts with program suppliers and whether, in the absence of any express contractual arrangement, broadcasters are free to grant or withhold retransmission consent without authorization from copyright holders. We respond first to the question of whether the rights created by §325(b)(1)(A) can be the subject

of bargaining by stations in contracts with program suppliers.[35]

In determining whether Congress intended Section 6 to limit the private right of contract, the Commission should follow the general canon of statutory interpretation, which requires it to look first to the plain language of the statute.[36] Where the language is clear and unambiguous, the Commission need not delve into the statute's legislative history.[37]

Although the legislature has the authority to regulate, subject to certain constitutional limitations, the private right of contract,[38] Congress explicitly declined to do so in this case. Section 325(b)(6) states that nothing in Section 6 "shall be construed as ... affecting existing or future video programming licensing agreements between broadcast stations and video programmers." Congress' protection of "existing or future video programming licensing agreements," §325(b)(6), necessarily includes the right of

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[35] While the Commission's question goes specifically to program supplier agreements, the broader question is whether broadcast stations can bargain away retransmission rights or proceeds in agreements with any third parties. We believe the answer is "yes" for the reasons set forth in the text.

[36] See Ardestani v. INS, 112 S. Ct. 515, 519 (1991) (citations omitted).

[37] See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

[38] See, e.g., West Coast Hotel Co. v. Parish, 300 U.S. 379, 57 S. Ct. 578, 581-82 (1937)

program suppliers and broadcasters to negotiate any of their contractual terms, including whether, and in what manner, retransmission consent will be granted and the proceeds allocated. Were the Commission to adopt an alternative interpretation of Section 6, it not only would ignore the plain language of the statute but also diminish the ability of broadcasters to attain favorable contractual terms by exchanging the benefits of retransmission consent for better rates and other terms from program suppliers.

Even if the Commission concludes that the language of Section 6 is not clear and unambiguous, nothing in the legislative history or purposes of the Act even remotely suggests that Congress intended to circumscribe relations between program suppliers and stations regarding retransmission consent rights. Congress enacted the 1992 Cable Act to support three broad justifications: to ensure the continued vitality of local broadcast stations[39]; to promote First Amendment interests in diversity of views[40] and continued access to local noncommercial educational stations[41]; and to redress competitive imbalances between cable operators and local broadcasters and other media.[42] To further these

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[39] See §2(a)(9)-(16); Senate Report at 41.

[40] See §2(a)(6), (b)(1).

[41] See §2(a)(7).

[42] See §2(a)(4)(11)-(16).

goals, Congress established, among other restrictions, must-carry and retransmission consent provisions to govern cable operators use of local broadcast signals. Although the legislative history offers detailed justifications for, and evidence to support, such restrictions, Congress is silent on the question of contractual relations between broadcasters and program suppliers. This silence is not surprising; collateral relations between the two entities -- broadcasters and program suppliers -- were irrelevant to the purposes of the 1992 Cable Act. Thus, there is no predicate in the statute for Commission regulation of these relations.

Moreover, the Commission should not interpret the statute in a manner that departs from the marketplace model that allows the parties to structure their own business arrangements. No justification for such a departure has been proffered because Congress was focused solely on regulating the actions of cable operators, not collateral arrangements between stations and programmers. In light of the plain language of the statute, and the absence of any directive in the legislative history, the Commission should rule that the 1992 Cable Act does not preclude stations from contracting with program suppliers with respect to their retransmission consent rights.

In construing §325(b)(6), the Commission should also remove any doubt that network affiliation contracts with television stations constitute "video programming licensing

agreements" (see Notice at footnote 74). Networks and syndicators are the two main outside sources of programming for broadcast stations. If a syndicator is entitled to negotiate with a station with regard to the exercise by the station of its retransmission consent with respect to a single program (or programs) that the syndicator supplies that is included in the station's signal, there is all the more reason why a television network, which supplies blocks of programming that are included in the station's signal, should be free to do so. Whatever other characterization may be attached to a network affiliation contract, it is inescapably an agreement whereby the station licenses programming from the network program supplier. The precise nature of the bargain -- whether the station pays cash to the syndicator for the program, or agrees to carry the network's commercials in the program -- is irrelevant. In fact, with the growth of barter syndication, today the differences in the two forms of agreement -- syndication and network -- are less significant than their similarities. More and more, stations compensate syndicators for programs either fully or partially by agreeing to carry the syndicator's commercials just as network affiliates agree to carry network commercials. In summary, the plain reading of the statutory language "video programming licensing agreement" clearly covers network affiliation contracts and there is no reason under the statute to distinguish between syndicators and networks for this purpose.

The Commission also asks for comment on whether broadcasters must, as a condition of exercising retransmission consent, obtain permission from copyright holders absent an express contractual provision to such effect. The unmistakable purport of the language of the Act (supported by the legislative history), as quoted in paragraph 64 of the Notice, is that the retransmission authority created by the Act with respect to the broadcast signal is a separate and distinct interest from the interests of copyright holders in the programs contained on the signal. The Act left compulsory copyright in place and created a new right to market the signal that resides in the broadcaster. Section 325(b)(6) leaves to private sector negotiation any claims by program suppliers to participate in retransmission consent benefits. Accordingly, absent a specific contractual arrangement, the statute does not constrain the broadcaster's exercise of retransmission consent.

## Conclusion

For the foregoing reasons, Capital Cities/ABC urges the Commission to implement the "Must-Carry" and "Retransmission Consent" provisions of the 1992 Cable Act in the manner described in these Comments.

Respectfully submitted,

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